Supreme Court, U.S.
FILED

941296 DEC 2 8 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ROBERT MAXWELL KELCH,

Petitioner,

versus

WARDEN, SOUTHERN NEVADA CORRECTIONAL CENTER AND DIRECTOR, NEVADA DEPARTMENT OF PRISONS,

Respondents.

On Petition For Writ Of Certiorari To The Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

ROBERT MAXWELL KELCH
S.N.C.C.
P.O. Box 100
Jean, Nevada 89026
In Proper Person

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May a State highest Court refuse to entertain and address a viable constitutional question? In view of the Ninth Circuit Court of Appeals Opinion that Petitioner's issue of jurisdiction to rescind a final and delivered commutation had not been spoken to by the Nevada Supreme Court, may that State Court then refuse to speak to that issue?

2. Is Petitioner protected by the Fourteenth Amendment right to due process when the Nevada Supreme Court refused to address the issue of jurisdiction?

PARTIES TO THE PROCEEDING

Parties to the proceeding in the Nevada Supreme Court are those in the caption Denial Of Habeas Corpus, Nevada Supreme Court Advanced Opinion, No. 25871.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE NEVADA SUPREME COURT AND THE NINTH CIRCUIT COURT OF APPEALS ON THE QUESTION OF WHETHER PETITIONER'S ISSUES AS PRESENTED TO THE NEVADA SUPREME COURT HAVE BEEN ADDRESSED BY THAT COURT 6

II. REFUSAL BY THE NEVADA SUPREME COURT TO ADDRESS THE ISSUE OF JURISDICTION IS A DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS 9

A. The Nevada Supreme Court erred when that Court declared that the "doctrine of law of the case" controlled Kelch's petition for writ of habeas corpus in the State court 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Burdick v. United States, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915) 10

Ex parte Wells, 18 How. 307, 15 L.Ed. 421 (1856) 12

Kelch v. Director, Nev. Dept. of Prisons, 107 Nev. 827, 822 P.2d 1094 (1991) 4, 6, 9, 12

Kelch v. Director, Nev. Dept. of Prisons, 10 F.3d 684 (9th Cir. 1993).....1, 5, 6, 8, 9, 13

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.E.2d 484 (1972) 4

NAACP v. State of Alabama ex rel. Patterson, Ala., 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) 11

Richardson v. Ramirez, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974)..... 11

Schick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).....7, 8, 9, 12

United States v. Wilson, 32 U.S. 150, 8 L.Ed. 640 (1833) 10, 12

Wright v. State of Georgia, Ga., 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963)..... 11

CONSTITUTIONS AND STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1257..... 2

28 U.S.C. § 2254..... 5

TABLE OF AUTHORITIES – Continued

Page

Fourteenth Amendment, United States Constitution 13

Article V, Section 14, Nevada Constitution 8

Nevada Revised Statutes

34.360 5

200.010 2

200.030(2) 2

213.010 ..... 2, 8

213.020(3) 2

213.040 2

213.060 3

213.100 3

No. _____

In The

Supreme Court of the United States

October Term, 1994

ROBERT MAXWELL KELCH,

Petitioner,

versus

WARDEN, SOUTHERN NEVADA CORRECTIONAL CENTER AND DIRECTOR, NEVADA DEPARTMENT OF PRISONS,

Respondents.

On Petition For Writ Of Certiorari To The Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Maxwell Kelch, requests that a writ of certiorari issue to review the judgment and opinion of the Nevada Supreme Court entered in this action on September 29, 1994, which is in direct conflict with the judgment issued out of the Ninth Circuit Court of Appeals, *Kelch v. Director,* 10 F.3d 684 (1993).

OPINIONS BELOW

The Order Denying Petition For Writ Of Habeas Corpus by the Nevada Supreme Court is recorded as an

Advanced Opinion, No. 25871 and filed with the Clerk of that Court on September 29, 1994. The opinion of the Ninth Circuit Court of Appeals is reported in 10 F.3d 864.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1); 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner (Kelch), was convicted on a plea of nolo contendere (accepted as a plea of guilty) to the charge of Murder in the Second degree (NRS 200.010 and NRS 200.030(2), on April 17, 1985, and subsequently was sentenced on May 15, 1985 to serve a term of twenty (20) years in the Nevada Department of Prisons. (Judgment of Conviction – Appendix A)

After serving approximately two (2) years, Kelch, pursuant to NRS 213.010 et seq., petitioned that Nevada Board of Pardons Commissioners (Board) for a commutation of his twenty year sentence. The petition was summarily denied by staff, however, Justice John Mowbray issued an order for Kelch to appear before the Board and following the mandate of NRS 213.020, § 3, served notice of the pending hearing on the Nye County District Attorney, Mr. Phillip L. Dunleavy (Dunleavy) some twelve days prior to the hearing.

Mr. Dunleavy, in direct contrast to NRS 213.040, declined to submit any information for the Pardons

Board's consideration at Kelch's hearing. Further, Dunleavy did not request a continuance of the hearing so that he could put forth argument in the form of paperwork or personal appearance.

Following an extensive procedure on May 12, 1987, the Board voted seven (7) to zero (0) to commute Kelch's sentence to a term of five (5) years. This commutation became a final order (NRS 213.060 – NRS 213.100) when it was signed by the secretary of the Board, Nikki Kinsley on May 15, 1989 and subsequently served on the Director of the Department of Prisons (NRS 213.100) and Kelch.

After experiencing backlash from the media, Dunleavy decided to become involved. In a "Motion" directed to the Nevada Board of Pardons, Mr. Dunleavy moved for a reconsideration of the commutation.

On November 23, 1987, the Board, without statutory authority, assumed jurisdiction, granted the "motion" and at the request of Mr. Dunleavy, reheard Kelch's application for pardon or commutation. At this hearing, Mr. Dunleavy admitted that prior to the first hearing he had ample time and notice to take any appropriate action at the original hearing. He stated simply that he had "screwed up" by not opposing the original application. Notwithstanding, Dunleavy's waiver he was allowed to present information to the Board. The said information that had been available to Dunleavy, at the time of the first hearing, thus it was not a situation of excusable neglect.

Dunleavy admitted, "I just missed the boat." (Appendix C. at 4.) However, the board still reconsidered its

original commutation and reinstated the twenty year sentence Kelch had been serving prior to the commutation. (Appendix B.)

Kelch originally submitted this Application for Writ of Habeas Corpus to the Fifth Judicial District Court, alleging his "liberty interest" had been violated by the board's rescinder of his original commutation. Subsequent to that filing, it was stipulated between the parties that a change of venue should be allowed so the lawsuit could be moved to the Eighth Judicial District Court, Clark County, Las Vegas, Nevada.

On May 22, 1989, the Honorable J. Charles Thompson heard arguments on the petition. After reviewing the pleadings, records and documents in the matter, Judge Thompson held that he did not feel a district court judge could properly rule on a matter previously determined by members of the Nevada Supreme Court even though those members had been sitting as the Pardons Board.

Hence an Appeal was perfected to the Nevada Supreme Court (Court), *Kelch v. Director, Nev. Dept. of Prisons,* 107 Nev. 827, 822 P.2d 1094 (1991) (Appendix D.), with counsel presenting the very same "liberty interest" argument to the State court. In his Opening Brief, Kelch's counsel cited *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), as authority in support of his position. In a lengthy opinion handed down by the Court on December 6, 1991 (Appendix D.), the Majority affirmed the lower court's denial of Petitioner's petition for habeas corpus. In a dissenting opinion, Justices Rose

and Young joined in holding that the Board had no jurisdiction to reconsider the original commutation. The majority never addressed the issue of jurisdiction.

Thereafter, Kelch filed a petition for a writ of habeas corpus in Federal District Court pursuant to 28 U.S.C. § 2254. The District Court, once more applying the "liberty interest" theory originally introduced by Kelch's counsel, denied the petition and Kelch appealed to the Ninth Circuit Court Of Appeals. In an opinion handed down on December 1, 1993, the Ninth Circuit held that a commutation of a prisoner's sentence created a "liberty interest." However, the Ninth Circuit also stated, in dicta, that no Nevada court had addressed the issue of whether the Nevada Board of Pardons Commissioners had jurisdiction to rescind Kelch's commutation. *Kelch v. Director, Nevada Dept. of Prisons*, 10 F.3d 684 (1993) (Appendix E.).

In view of the Ninth Circuit's statement in dicta that Kelch had not been able to have a Nevada court speak to whether the second hearing was, in fact, a legal forum, Kelch submitted a second Application for Writ of Habeas Corpus to the Eighth Judicial District Court. Once more, The Honorable J. Charles Thompson, District Court Judge, summarily denied the writ (Appendix G.).

Kelch then submitted an Application to the Nevada Supreme Court pursuant to NRS 34.360, citing original jurisdiction. In that petition, Kelch challenged the manner in which the Nevada Board of Pardons Commissioners had assumed jurisdiction to rescind the prior commutation granted by that Board at an earlier hearing. Most recently, The Nevada Supreme Court denied Kelch's application, holding that in an earlier opinion the Court

had rejected the argument and cited "the doctrine of law of the case." *Kelch v. Warden,* Order Denying Petition For Writ Of Habeas Corpus, Case No. 25871 (Sept. 29, 1994) (Appendix F.). In actuality, the jurisdictional issue cannot be found in any reading of the opinion handed down by the Nevada Supreme Court in *Kelch v. Director,* 107 Nev. 827, 822 P.2d 1094 (1991). (*See, Kelch v. Director,* 10 F.3d 684 (9th Cir. 1993), at page 686)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE NEVADA SUPREME COURT AND THE NINTH CIRCUIT COURT OF APPEALS ON THE QUESTION OF WHETHER PETITIONER'S ISSUES AS PRESENTED TO THE NEVADA SUPREME COURT HAVE BEEN ADDRESSED BY THAT COURT.

In the Statement Of The Case, Petitioner cited the Nevada Supreme Court's Order Denying Petition For Writ Of Habeas Corpus (Appendix F.). In that Order, the Nevada Court invoked the "doctrine of law of the case" and held that Kelch's issues had all been previously addressed by that Court.

In *Kelch v. Director,* 10 F.3d 684 (9th Cir. 1993), the Ninth Circuit Court of Appeals held:

> Nor has any Nevada court, including that Nevada Supreme Court that heard Kelch's state habeas petition, directly addressed the issue whether the Nevada Board of Pardons Commissioners has jurisdiction to rescind its grant of a commutation of sentence. . . . Kelch v. Director,

> Nevada Dept. Of Prisons, 10 F.3d 684 (9th Cir.1993).

The two Orders are in conflict.

Kelch presented the jurisdictional issue for the Nevada Supreme Court's consideration, that according to the Ninth Circuit Court Of Appeals, had never been addressed by any Nevada court; specifically, whether the Nevada Board Of Pardons had jurisdiction to rescind its original commutation granted to Kelch. *see Schick v. Reed,* 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).

The power to grant pardons in the State of Nevada is a State constitutional entity and not, as the Ninth Circuit stated, created by the Nevada Legislature.

> Our prediction is further buttressed by the fact that under Nevada law the Nevada Board of Pardons Commissioners is an executive board. *State v. District Court,* 85 Nev. 485, 457 P.2d 217, 218 (1969) ("In this state the granting of any relief from punishment after incarceration in the state prison is an executive function **authorized by the legislature and performed by the state board of parole commissioners, or by the state board of pardons commissioners.**"); *State v. Clark,* 90 Nev. 144, 147, 520 P.2d 1361, 1363 (1974) ("In this State the granting of relief from incarceration is authorized by the legislature and performed by the state board as an executive function.") *Kelch v. Director, Nevada Dept. Of Prisons,* 10 F.3d 684 (1993) at 686-687.

A proper reading of NRS 233B reveals the Ninth Circuit Court misapplied the Nevada Administrative Procedure Act (Appendix H. – I.), particularly in light of the

inclusion of Article 5 section 14 of the Nevada constitution in the Ninth Circuit Court's decision.

> Article 5 section 14 of the Nevada constitution and section 213.010 of the Nevada Revised Statutes establish the Nevada Board of Pardons Commissioners. The Board has the power to commute sentences "upon such conditions and with such limitations and restrictions as they may think proper." Nev.Const. art. V § 14. However, neither the Nevada constitution nor Nevada statutory law states whether, or under what circumstances, the Board may revoke a commutation, once granted. *Kelch v. Director, Nevada Dept. Of Prisons*, 10 F.3d 684 (1993) at 686.

This total misapprehension of Nevada constitutional law, must be examined in light of case law from this Court that speaks to the pardoning power. This examination is necessary because of the comparisons that are evident between the Nevada pardoning power (derived from the Nevada constitution), and the pardoning power of the President of the United States that is bestowed on that office by the Constitution of the United States. " . . . The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice. . . . " *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974). So too is the pardoning power of the Nevada Board of Pardons "a consistent pattern of adherence to the English common-law practice." This adherence, then, must be consistent. To be consistent, any pardon or commutation that is a final edict may not be rescinded.

There is absolutely no provision in the State of Nevada that allows for review of a legally bestowed pardon

or commutation. This absence of a legal vehicle gave rise to the question of jurisdiction submitted, first to the Nevada Supreme Court, *Kelch v. Director, Nev.Dept. of Prisons*, 107 Nev. 827, 822 P.2d 1094 (1991); into federal district court and then to the Ninth Circuit Court of Appeals. *Kelch v. Director, Nevada Dept. of Prisons*, 10 F.3d 684 (1993). After the Ninth Circuit held that even though the issue of jurisdiction had not been addressed by the Nevada Court, the Ninth decided to "predict" what the Nevada Court would have held had the issue been spoken to by the State Court.

With the Ninth Circuit holding that jurisdiction had not been addressed by any Nevada court, Kelch presented a petition for habeas corpus to the Nevada Supreme Court, making jurisdiction the main theme in that petition. The State court dismissed, citing the "doctrine of law of the case" as its authority. (Appendix D.)

II.

REFUSAL BY THE NEVADA SUPREME COURT TO ADDRESS THE ISSUE OF JURISDICTION IS A DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. The Nevada Supreme Court erred when that Court declared that the "doctrine of law of the case" controlled Kelch's petition for writ of habeas corpus in the State court.

According to this Court's opinion in *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974):

> A fair reading of the history of the English pardoning power, from which our Art.II, § 2, cl. 1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, and that it cannot be **modified, abridged, or diminished by the Congress**. . . . *Id.* 419 U.S. at 267, 95 S.Ct. at 385. (Emphasis added).

Applying this concept to the Nevada Board of Pardons, it becomes apparent that the Board, like the President, is an entity of the constitution and, " . . . [c]ompels the conclusion that the power flows from the Constitution alone, and that it cannot be modified, abridged, or diminished. . . . " Because Kelch recognized this fact, that a pardon, once granted and delivered, became a final edict, *United States v. Wilson*, 32 U.S. 150, 8 L.Ed. 640 (1833); *See also Burdick v. United States*, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915), the issue of jurisdiction was presented to the Nevada Court for review. That Court refused to address the issue.

Ancillary to the problem of the Nevada Supreme Court refusing to rule on the issue of jurisdiction is that no district court in Nevada will presume to overrule the higher court and speak to that issue as evidenced by The Honorable J. Charles Thompson's statement that he would not take it on himself to overrule the Nevada Supreme Court. (Appendix G.)

Kelch submits that refusal of the Nevada courts to speak to an issue of such importance is a denial of the Fourteenth Amendment. Kelch further submits that the State of Nevada cannot take the position that refusal by

the Nevada courts to address the jurisdictional question rests on "adequate grounds." *See, NAACP v. State of Alabama ex rel. Patterson,* Ala. 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Wright v. State of Georgia, Ga.* 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963).

In the seminal case of *Richardson v. Ramirez, infra,* this Court held that a state court could not refuse to address a constitutional question and further held that the doctrine of "case or controversy" demanded a review of an "actual and acute controversy."

> [A]nd it is well settled that, where there is "an actual and acute controversy," an appeal from a. . . . court presents a "case or controversy" within this Court's jurisdiction. *Nashville, C. & St. L. R. Co. v. Wallace,* 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730 (1933). Indeed, any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 23 U.S.C. section 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court.
>
> (T)he mere failure of a state court to award. . . . relief in a proceeding. . . . is not an "adequate ground" which precludes our review of its federal constitutional holding. *Richardson v. Ramirez,* 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974) footnote 13 at page 2665.

The manner Richardson was treated in the California court is certainly indicative of the case before this Court. The Nevada Supreme Court has refused to address the major issue of jurisdiction.

The argument that "liberty interest" has been addressed is not dispositive of the case before this Court. Kelch had a "vested interest" in the commutation and the "hearing" afforded Kelch in protection of the "liberty interest" does not meet the criteria demanded by the Fourteenth Amendment. History tells us that a final pardon or commutation cannot be reviewed. *Schick v. Reed, supra,* citing Ex parte Wells, 18 How. 307, 15 L.Ed.421 (1856) nor can that final pardon or commutation be challenged, by either party. The *Schick* Court, quoting from *United States v. Wilson,* 7 Pe. 1150, 8 L.Ed. 640 (1833), further stated that a pardon does not have to be pleaded to become final.

Stated succinctly, the Nevada Board of Pardons had no jurisdiction to review the final commutation granted and delivered to Kelch.

It is obvious that Mr. Justice Young and Mr. Justice Rose of the Nevada Supreme Court recognized the lack of jurisdiction at oral argument as witnessed in Mr. Justice Rose's dissenting opinion.

> Respectfully, I dissent. I conclude that the Nevada Board of Pardons Commissioners (Board) did not have jurisdiction to rescind the commutation of a sentence. Once the Board issued an order with an effective date, Kelch had a protected liberty interest in release and the Board lost jurisdiction to rescind the commutation. *Kelch v. Director, Nev. Dept. of Prisons,* 107 Nev. 827, 822 P.2d 1094 (1991) (Dissenting opinion).

This dissenting opinion is the only reference to jurisdiction that has been written to by the Nevada Supreme Court. *See Kelch v. Director,* 10 F.3d 684 (9th Cir. 1993).

Kelch submits that the Nevada Court's refusal to speak to the issue of jurisdiction is a denial of his right to due process under the Fourteenth Amendment to the United States. This refusal evidently flows from the very make up of the Court and Pardon Commissioners.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT MAXWELL KELCH
S.N.C.C.
P. O. Box 100
Jean, Nevada 89026
In Proper Person

INDEX TO APPENDIX

Page

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS.....App. 1

RECORDER'S TRANSCRIPT RE: DEFENDANT'S PROPER PERSON PETITION FOR WRIT OF HABEAS CORPUS.....App. 3

JUDGMENT .....App. 7

ORDER COMMUTING SENTENCE.....App. 9

TRANSCRIPT OF PROCEEDINGS, SEMI-ANNUAL HEARING .....App. 10

KELCH V. DIRECTOR, ET AL., SUPREME COURT OF NEVADA OPINION .....App. 12

KELCH V. DIRECTOR, ET AL., UNITED STATES COURT OF APPEALS, NINTH CIRCUIT OPINION.....App. 28

NRS 233B.020 LEGISLATIVE INTENT .....App. 48

NRS 233B.039 APPLICABILITY.....App. 49

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT MAXWELL KELCH,
Petitioner,
vs.
WARDEN, SOUTHERN NEVADA CORRECTIONAL CENTER AND DIRECTOR, NEVADA DEPARTMENT OF PRISONS,
Respondents.

No. 25871

(Filed Sep. 29, 1994)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This original petition for a writ of habeas corpus challenges a determination of the Board of Pardons Commissioners granting a district attorney's motion to reconsider the Board's prior order commuting petitioner's twenty year sentence to a sentence of five years.

Having considered appellant's arguments, we conclude that relief is not warranted. Specifically, this court considered and rejected appellant's arguments in our opinion affirming the district court's denial of appellant's first petition for a writ of habeas corpus. Kelch v. Director, 107 Nev. 827, 822 P.2d 1094 (1991). The doctrine of law of the case prevents relitigation of these arguments. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Accordingly, we deny the petition.

It is so ORDERED.

/s/ Rose, C. J.
Rose

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

/s/ Springer, J.
Springer

/s/ Shearing, J.
Shearing

cc: Hon. J. Charles Thompson, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Potter Law Offices
Loretta Bowman, Clerk

APPENDIX B

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT MAXWELL KELCH, Defendant.	CASE NO. C88319 DEPT. NO. I DOCKET NO. "J" (Filed Jun. 7, 1994)

BEFORE THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE

THURSDAY, JUNE 2, 1994; 9:00 A.M.

RECORDER'S TRANSCRIPT RE: DEFENDANT'S PROPER PERSON PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: WILLIAM HENRY, ESQ.
Deputy Attorney General

For the Defendant: CAL J. POTTER, III, ESQ.

Recorded by: JANICE R. LISTON, Special Reporter/ Transcriber

[p. 2] THURSDAY, JUNE 2, 1994; 9:00 A.M.

THE COURT: Robert Maxwell Kelch.

MR. HENRY: Bad pennies, Judge.

THE COURT: Mr. –

MR. POTTER: Cal Potter appearing on behalf of Mr. Kelch, your Honor.

THE COURT: I've had a chance to look at the petition. I've also read the Ninth Circuit's decision.

MR. POTTER: I had talked with Mr. Henry about getting a week's extension to file an amendment dealing with one of the issues here before the Court. And he had no objection to that occurring.

MR. HENRY: Well, Judge, I spoke with counsel when I got his notice of appearance yesterday. I didn't answer this because when I was given it by the district attorney last week, being very familiar with it since I litigated it and argued it in the Ninth Circuit, I thought that if there was ever a case that was ripe for summary disposition this was it. And I still think that. If the Court thinks that it isn't ripe for summary disposition or thinks that it ought to be briefed, then I agree with counsel. I'd be glad to do that.

THE COURT: The opportunity to overrule both the Ninth Circuit and the Supreme Court of the State of Nevada in one decision is so tempting.

MR. POTTER: Well, there's good precedent in reading those, if [p. 3] you want to read the footnotes and dissent, your Honor, you can certainly have that opportunity.

THE COURT: I can't, Mr. Potter. I'm not going to grant this petition for a variety of reasons. I did read the Ninth Circuit. I have a copy of it up here if you want to discuss it, but I can't grant this writ.

MR. POTTER: What I'm asking is an opportunity to brief the other issue on the successor petition.

THE COURT: Convince me that I should? I agree with Mr. Henry. You can go up to the, you can go back to the Supreme Court and explain to them why they should reverse themselves, but I am not going to reverse them. The answer is no.

The petition for the writ is denied.

MR. POTTER: Can we have findings of facts and conclusions of law pursuant to –

THE COURT: Is it necessary on a denial of this kind of a petition?

MR. POTTER: I believe that it is under the statutory scheme.

MR. HENRY: I guess I'd be glad to prepare –

MR. POTTER: And I don't think it's a difficult task for him to do.

MR. HENRY: It occurs to me that if counsel intends to appeal to the Supreme Court from your order then that might be helpful. But if he intends just to petition them for an original writ, then that wouldn't be helpful.

THE COURT: Which do you intend to do?

[p. 4] MR. POTTER: I would assume we're going to appeal.

THE COURT: You're going to appeal? All right. Let's propose findings would be appropriate.

MR. HENRY: All right. I'll prepare them, your Honor.

MR. POTTER: Thanks, Judge.

* * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above-entitled case.

/s/ Janice R. Liston
JANICE R. LISTON
Special Reporter/Transcriber

APPENDIX C

Case No. 1311

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

-v-

ROBERT MAXWELL KELCH,

Defendant.

_____/

JUDGMENT

(Filed May 15, 1985)

The Defendant, ROBERT MAXWELL KELCH, being in Court at this time, accompanied by his counsel, STEWART BELL, Esq., of Las Vegas, Nevada, and appearing for judgment herein, and THE STATE OF NEVADA, Plaintiff, being represented by A. D. DEMETRAS, District Attorney of the County of Nye, State of Nevada; and

The Defendant being informed of the filing of an Information against him on the 7th day of February, 1985, by the District Attorney of the County of Nye, State of Nevada, and the said Defendant on the 17th day of April, 1985, having entered a plea of guilty, to the charge of Murder of the Second Degree, in violation of NRS 200.010 and NRS 200.030(2), a felony.

The Court finds that the Defendant was born on December 19, 1950, at Las Vegas, Nevada, and that his Social Security Number is 530-44-8110, and his FBI number is 413 177 S8.

The Defendant being then asked by the Court whether he had any legal cause to show why judgment should not be pronounced against said Defendant, and no cause being shown,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that you, ROBERT MAXWELL KELCH, are guilty of the crime of Murder of the Second Degree, in violation of NRS 200.010 and 200.030(2), a felony, and that you be punished by imprisonment in the Nevada State Prison for a term of twenty (20) years from this date. You are granted full credit against said sentence for all of your pre-sentence incarceration, consisting of one hundred thirty-two (132) days to the date hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ROBERT MAXWELL KELCH be now committed to the custody of the Sheriff of Nye County, State of Nevada, and by him transported to the Nevada State Prison and delivered to the Director of the Department of Prisons, and that, in execution of this judgment, said Defendant be imprisoned and detained at the Nevada State Prison until the imprisonment order of this judgment shall have been duly complied with.

IT IS FURTHER ORDERED that the Clerk of this Court certify a copy of the records in this case and deliver the same to the Chief Parole and Probation Officer of the State of Nevada, at Carson City, Nevada.

DONE IN OPEN COURT this 15th day of May, 1985.

/s/ William P. Beko
DISTRICT JUDGE

APPENDIX D

ORIGINAL and DUPLICATE to:
Applicant and Prison Officials
Clerk of the Court
Pardons Board File

NEVADA BOARD OF PARDONS

Carson City, Nevada

Order Commuting Sentence

Pursuant to the authority of Nevada Revised Statutes Section 213.010 to Section 213.100, vested in the Nevada Board of Pardons, the following ORDER is issued:

APPLICANT ROBERT M. KELCH on MAY 15, 1985 was sentenced by the Honorable WILLIAM P. BEKO , District Judge of the FIFTH Judicial District Court, in and for the County of NYE , State of Nevada, to imprisonment in the Nevada State Prison, for the crime of MURDER SECOND DEGREE – 20 YEAR SENTENCE. ON MAY 12, 1987, SAID SENTENCE WAS COMMUTED TO 5 YEARS. THIS ACTION WAS RESCINDED BY FORMAL ACTION OF THE NEVADA BOARD OF PARDONS AND HIS ORIGINAL SENTENCE OF 20 YEARS WAS REINSTATED.

IT IS HEREBY ORDERED, that effective this date applicant's sentence be commuted from FIVE YEARS to TWENTY years of imprisonment in the Nevada State Prison, less statutory and other good time credits; that upon completion of said term ___ he be discharged from this sentence without further penal obligation to this state.

DATED this 23rd day of NOVEMBER , 1987

NEVADA BOARD OF PARDONS

/s/ Carol Thomsen
CAROL THOMSEN,
Secretary to the Board

APPENDIX E

App. 10

EXHIBIT "2"

NEVADA BOARD OF PARDONS

TRANSCRIPT OF PROCEEDINGS

SEMI-ANNUAL HEARING

FALL 1987

8:07 a.m., Monday
November 23, 1987

Supreme Court Building
Carson City, Nevada

BOARD MEMBERS PRESENT

GOVERNOR RICHARD H. BRYAN, Chairman
ATTORNEY GENERAL BRIAN McKAY, Member
CHIEF JUSTICE E. M. GUNDERSON, Member
JUSTICE JOHN MOWBRAY, Member
JUSTICE CHARLES SPRINGER, Member
JUSTICE THOMAS L. STEFFEN, Member
JUSTICE C. CLIFTON YOUNG, Member

* * *

[p. 4] me one note in any file of any kind, and I was buried, and we got the notice late, and there is no real excuse.

I did not notify the Board that I was not prepared to come forward. I hadn't even had time to sit down and read the file to familiarize myself with it. I apologize for it. There is nothing else I can do about it. I missed the boat on it, and I sincerely apologize. We had ten days notice.

And I recognize that it was not an easy decision for this Board to decide to give us a rehearing. It's not something that's done on a regular basis. I don't know if

it's ever been done before. And I very definitely recognize that and appreciate it.

JUSTICE STEFFEN: Mr. Dunleavy, I would like to interrupt, too. I think one of the things that was somewhat upsetting to the Board, at least as reported in the press, your reason was not because you were inundated with work, and certainly you made no Motion for a Continuance, but rather you reported apparently to the press that you didn't in your wildest imagination think this Board would grant relief.

MR. DUNLEAVY: Well, I made quite a few comments, and that's the one that happened to wind up in the paper. I didn't think the Board would grant it, but admittedly, and I'm the first to acknowledge it and I did tell them, that I felt the decision was made because only one

* * *

APPENDIX F

Robert Maxwell KELCH, Appellant,

v.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, George Sumner, Respondent,

No. 21078.

Supreme Court of Nevada,

Dec. 6, 1991.

Inmate filed petition for writ of habeas corpus, challenging decision of Board of Pardons Commissioners revoking previously granted commutation of sentence. The Eighth Judicial District Court, Clark County, J. Charles Thompson, J., denied petition, and petitioner appealed. The Supreme Court, Springer, J., held that: (1) inmate had protected liberty interest in commutation, but (2) inmate was accorded due process in revocation of commutation.

Affirmed.

Steffen, J., filed concurring opinion.

Young, J., filed dissenting opinion, with which Rose, J., agreed.

Stewart L. Bell, Las Vegas, for appellant.

Frankie Sue Del Papa, Atty. Gen., Carson City, Robert J. Gower and John E. Simmons, Deputy Attys. Gen., Las Vegas, for respondent.

OPINION

SPRINGER, Justice:

In this lawsuit, appellant Robert Kelch (Kelch) contests the revocation of a commutation that had previously been granted to him by the Nevada Board of Pardons Commissioners (the "Board" or "Pardons Board"). In 1985, Kelch pleaded guilty to a charge of second degree murder and was sentenced to twenty years in the Nevada State Prison. After Kelch had served two years of this sentence, he applied for a pardon/commutation from the Pardons Board. On May 12, 1987, the Board met and considered Kelch's petition. At this hearing, Kelch and his attorney, testified before the Board; in addition, the Board received a letter from Judge Beko (the sentencing judge) stating that he neither supported nor objected to Kelch's petition. The district attorney from Nye County (the prosecuting attorney) had notice of the meeting, but did not appear or file an objection. Following the hearing, the Board issued an order commuting Kelch's sentence to five years.

Upon learning of the commutation, the Nye County District Attorney filed a petition for reconsideration. In response to the district attorney's motion, the Pardons Board placed the matter on its November 23, 1987, agenda. At this hearing, Kelch and his attorney presented testimony in support of the Board's original decision. Conversely, the Nye County District Attorney presented testimony in favor of rescinding the commutation and reinstating the original sentence. Following the hearing, the Board voted 6-1 to rescind the commutation and reinstate the original sentence.

Kelch then filed for a writ of habeas corpus in the United States District Court for the District of Nevada. On December 13, 1988, the federal court denied this petition, holding that Kelch had failed to exhaust his remedies in the Nevada courts. Thus, on March 9, 1989, Kelch filed an application for writ of habeas corpus in this court. This court denied the writ and instructed Kelch that he could not bring the matter directly before this court, but rather must file for a writ in the district court.

On March 31, 1989, Kelch filed for a writ of habeas corpus from the Fifth Judicial District Court. The parties then stipulated to have the matter heard in the Eighth Judicial District Court. On May 22, 1989, the matter came before Judge Thompson, and after listening to oral argument, he denied the writ. Kelch now appeals.

Kelch's sole contention in this appeal is that the board, in rescinding its original commutation order, violated his due process rights. To address this argument, it is necessary to review several principles of due process jurisprudence. To begin, the due process clause only applies where the claimant has been deprived (or is in jeopardy of being deprived) of some type of liberty interest. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).[1] Thus, if a liberty interest is

---

[1] Of course, the requirements of due process also apply where the government is attempting to deprive a person of a life interest or a property interest. Because Kelch's interest in his commutation appears to be, if anything, a liberty interest, however, we have not included a discussion of property or life interests in our analysis.

not at stake, the claimant cannot assert the protections of due process. *Id.* If, however, the government is attempting to infringe on a protected liberty interest, then it (the government) may do so only if it follows the procedures mandated by the due process clause. *Id.* Consequently, in analyzing Kelch's due process claim, two questions must be asked: (1) Did the Board deprive Kelch of a protected liberty interest? (2) If so, did Kelch receive all the process that he was due? We will now address each of these issues in turn.

The initial question that must be addressed is whether the Board's action deprived Kelch of a protected liberty interest. In *Morrissey v. Brewer,* 408 U.S. at 481, 92 S.Ct. at 2600, the Court stated that "whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss." In *Morrissey,* the Court observed that the liberty of a parolee "includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee and often on others." *Id.* at 482, 92 S.Ct. at 2601. Accordingly, the Court held that before parole could be revoked, the parolee must receive some "orderly process, however informal." *Id.*

The procedural protections of due process are not invoked, however, *every* time an individual suffers a "grievous loss." In *Jago v. Van Curen,* 454 U.S. 14, 17, 102 S.Ct. 31, 34, 70 L.Ed.2d 13 (1981), the parole board informed the prisoner that he was to be granted parole, but then rescinded its decision prior to release of the prisoner. The court conceded that this action by the parole board had caused a "grievous loss" in the mind of

the prisoner. Nevertheless, the Court held that no protected liberty interest had been created, since the prisoner had never received the benefit promised, *i.e.*, the prisoner was never actually paroled. *Id.* Because no liberty interest had been created, the Court reasoned, the parole board was not required to conform to the dictates of due process in reversing its original decision. *Id.*

In *Ellard v. Alabama Board of Pardons and Paroles*, 824 F.2d 937 (11th Cir.1987), *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1987), the court expanded on the principles discussed in *Jago*. In *Ellard*, the Alabama Parole Board granted parole to the prisoner; the prisoner was then released directly into the custody of the State of Georgia to serve a life sentence there. *Id.* at 940. Following a "burst of public outrage at the parole decision," however, the Alabama Parole Board revoked its original ruling and rescinded its grant of parole. *Id.* at 940-41. The question before the Eleventh Circuit was whether, by originally granting parole, the Alabama Board had given the prisoner a protected liberty interest.

The court in *Ellard* held that a such an interest had been created. In so holding, the court observed that: "The states, of course, may elect not to confer rights . . . that are not inherent in the Constitution. But once a state does choose to confer such a right, the prisoner's interest has 'real substance' and can be revoked only under the limitations imposed by the due process clause." *Id.* at 943. The court then distinguished *Jago*, by pointing out that there, the benefit conferred by the parole board, *i.e.*, parole, had never actually been received by the prisoner. *Id.* at 943 n. 4. By contrast, in *Ellard*, the prisoner had *actually received* parole, though not outright release. *Id.*

Because the benefit received by Ellard thus had "real substance," the court reasoned, it could be revoked only under the limitations imposed by due process.[2]

Applying these principles to the facts of this case, we conclude that the Pardons Board's original order created a protected liberty interest in favor of Kelch. Here, it is clear that Kelch *actually received* the benefit conferred by the Pardons Board. Following the May 12, 1987, hearing, the Board issued an "Order Commuting Sentence," which stated that "[i]t is hereby ordered that *effective this date* applicant's sentence be commuted from 20 years to five years of imprisonment. . . . " (Emphasis ours.) Thus, by virtue of this order, Kelch *received* his commutation on May 12, 1987, and his case is therefore distinguishable from *Jago*, where the prisoner did not receive parole, but was simply informed that he *would soon* receive parole. For this reason Kelch obtained an interest with "real substance" at the time the Pardons Board issued its order, and the deprivation of this interest caused Kelch to suffer a "grievous loss." Accordingly, Kelch's commutation could be revoked only under the limitations imposed by the due process clause.

Having concluded that Kelch received a protected liberty interest from the Pardons Board, we now turn to the question of whether the Board deprived him of that interest in a manner consistent with the due process clause. The United States Supreme Court has often dealt

---

[2] The *Ellard* court then remanded the case to the district court in order to conduct factual findings as to whether Alabama had accorded the prisoner the process that he was due before his parole was rescinded. *Id.* at 949.

with the issue of what procedures are required by due process, and has noted that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. at 481, 92 S.Ct. at 2600. In addition, the Court has explained that the most fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976).

In *McLaughlin v. Bronson*, 537 A.2d 1004 (Conn.1988), the court discussed the requirements of due process in a situation quite similar to this one. In *McLaughlin* the Connecticut Board of Pardons commuted the sentence of the prisoner (McLaughlin) from twenty years to time served. *Id.* at 1005. Following the hearing, however, the Board learned that McLaughlin's wife had made several material misrepresentations during her testimony before the board. *Id.* For this reason, the Board reheard the matter and rescinded the commutation. *Id.* at 1005-6.

The prisoner then brought an action for habeas corpus, and alleged, among other things, that the Board of Pardons had violated his due process rights. The Connecticut Supreme Court disagreed. The court began its analysis by assuming that the prisoner had received a protected liberty interest when he obtained the commutation. *Id.* at 1008 n. 3. The court then held that because the Board of Pardons had afforded McLaughlin the following protections: "notice, hearing, representation by counsel, the right to confront and cross-examine witnesses, a neutral and detached hearing body and a written statement articulating the reasons for revocation." McLaughlin had

received all the process that he was due under the fourteenth amendment. *Id.*

In the instant case it is clear that the Board accorded Kelch due process when it revoked his commutation. Kelch was given notice and an opportunity to appear at the revocation hearing. In addition, Kelch was represented by counsel at this hearing, and was given the opportunity to present evidence, witnesses, and documents on his own behalf. Further, it appears from the record that Kelch was able to contradict and confront those witnesses that testified against him at the November hearing. Moreover, even though the Board's order did not appear in the form of a written decision, many of the Board members stated, on the record, their reasons for revoking the original commutation. Because the Board gave Kelch all these procedural protections before revoking his commutation, we hold that Kelch was given the opportunity to be heard at a meaningful time and in a meaningful manner, and thus received due process.

Accordingly, the order of the district court is affirmed.

MOWBRAY, C.J., concurs.

STEFFEN, Justice, concurring:

I concur in the majority opinion but feel compelled to respond to the gratuitous remarks of the dissenting justices regarding the participation of the members of this Court on the Board of Pardons (Board).

Nevada is a unique state. As far as I have been able to ascertain, Nevada's mechanism for administering clemency is also unique among the states. During the

1863 Nevada Constitutional Convention, the proposed powers of pardon and reprieve were initially vested in the Governor. The available discussion on the proposal is limited and reads as follows:

> Mr. Brosnan said he thought the section conferred altogether too unlimited and dangerous power upon the Governor. He would like to have the opinion of someone who was conversant with this matter.
>
> Mr. Johnson said the section conferred upon the Governor not only great power, but also great responsibility. He thought it would be better to divide both, and suggested that the pardoning power might be rested in the Governor, Chief Justice and Attorney General. In order to devise some proper arrangement, differing possibly, from the systems in vogue in the other States, he moved that the Committee recommend the reference of the section to a Special Committee. As to the particular matter referred to by Mr. Brosnan, of the power of the Executive to impose restrictions and limitations, the object was to enable the executive to require pardoned criminals to leave the State – by which means the commonwealth often got rid of dangerous characters.

A. Marsh, S. Clemens & A. Bowman, Reports of the 1863 Constitutional Convention of the Territory of Nevada 135 (W. Miller, E. Bushnell 1972).

Unfortunately, we apparently do not have additional history concerning the deliberations of the committee assigned to the task of formulating recommendations for

the constitutional provision conferring the powers of pardon and reprieve. History reveals, however, that the initial proposal vesting all such power in the Governor was changed to include the Governor, the Justices of the Supreme Court and the Attorney General acting by majority rule, with the Governor necessarily voting with the majority. Thus, the current composition and decisional powers of the Board have existed as part of our original constitution since 1864 when Nevada was admitted to the Union.

There are current moves under way to amend Nevada's constitution in order to change its pristine clemency mechanism by removing the Justices of the Supreme Court from the Board. I have heard two reasons advanced in favor of the proposition, neither of which, in my opinion, has validity. The first reason may be treated summarily. It is argued that the members of this court are too busy to perform their functions as members of the Board. The Board meets twice yearly. The total time necessary to fully prepare for and conduct the hearings is three days. I suggest that the business of the Board is sufficiently important to warrant an allowance of time necessary to fulfill the purposes of the Board. Moreover, necessity suggests that an intermediate appellate court will become a reality in the not distant future, thus providing more time for the members of this court to perform their duties on the Board. In any event, the powers of pardon and commutation have been viewed with a high degree of concern from the time of Nevada's birth as a state. Criminal accountability with its associated penalties is achieved at substantial social cost. We should view with equal importance the prospect of granting relief from

lawfully imposed sentences, given the potential cost to society of an undiscerning use of the Board's powers.

The dissenting justices address the second, and ostensibly more plausible reason for relieving the members of this court from service on the Board by stating that "[t]his case illustrates why Supreme Court Justices should not sit on the Board of Pardons. We grant early release with one hand and snatch it away with the other. A conflict of interest is inherent when this court is asked to review its own decisions while sitting in another capacity." I disagree with every aspect of the quoted conclusions for the following reasons:

1. There is no conflict, inherent or otherwise, in having the members of this court sit on the Board. Although I will address the instant case separately, it is worth emphasizing that, as far as research reveals, the case before us is unique in the annals of the Board. It must also be emphasized that the Supreme Court is not a sentencing body. Despite the fact that under circumstances both historically and comparatively rare, the Court must fulfill its constitutional mandate to modify sentences that are constitutionally infirm, in no case does the court have any sort of "vested" interest in maintaining convictions and sentences determined and imposed by juries and other judges. The reference by the dissent to the members of this court granting relief with one hand (sitting as members of the Board) and snatching it away with the other (as justices sitting on appellate review) is in no sense supportive of the proposition that we do so in a position of conflict. This court routinely processes petitions for rehearing in which the court is invited to reconsider the propriety of its own rulings. I have yet to hear a

justice contend that a conflict arises by virtue of the fact that we are faced with the prospect on rehearing of declaring ourselves in error in our initial dispositions. As Supreme Court Justices our sworn duty is to respect and comply with the law and conduct ourselves so as to promote public confidence in the integrity and impartiality of the judiciary. We are able to do so as members of the Board with even less potential "conflict" than we do as members of an appellate court often petitioned to reconsider the propriety of its own rulings. Usually, as Board members we simply determine whether the passage of time and circumstances developing after an applicant's original conviction and sentence warrant an exercise of the Board's powers of clemency.

2. The dissent focuses on the instant case specifically when it declares that "[a] conflict of interest is inherent when this court is asked to review its own decisions while sitting in another capacity." The assertion is seriously flawed. First, this court was not asked to review "its own decision," for we do not sit as a court when functioning as constitutional members of the Board. What we are asked to do as a court in this unique case, is to review the decision of the constitutionally comprised Board on which we sit as individual members. I must assume that if any members of this court, including the dissenting justices, viewed themselves in a position of conflict in undertaking such a review, they would have disqualified themselves as required by Canon 3 C of the Supreme Court Rules. Indeed, the mere fact that the dissenting justices have concluded that the Board's action was without jurisdiction is cogent evidence that the process is unimpaired by some sort of misguided allegiance

to Board action that would impact the capacity of this court to exercise an independent and honest judgment on the merits. Moreover, this court has previously validated the propriety of members of this court acting in one capacity concerning the same matter that ultimately comes before the same justices sitting in a different capacity as part of the reviewing court. Thus, in both *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988), and *In re Petition to Recall Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988), members of this court who acted in an administrative capacity to reach or make decisions that later became directly implicated in litigation reviewed or otherwise acted upon by the same justices as part of this court, were not disqualified by any form of inherent conflict posed by acting in two different capacities concerning the matters that were litigated. To the contrary, we held that "[e]ven where the court's prior judicial and administrative actions may support an inference that the justices in question possess legal opinions at odds with appellant's views of the court's constitutional authority, that fact does not constitute a legally cognizable ground for disqualification." *Goldman*, 104 Nev. at 654, 764 P.2d at 1302. An honest, honorably motivated judge is equally able to adjudicate impartially whether rehearing his or her own prior rulings or the rulings or decisions reached in part by the same judge authoritatively acting in another capacity. Justices of this court are not infrequently required to do just that as part of their sworn duties of office.

Because supreme court justices are elected in Nevada, it would undoubtedly be of political advantage for justices to be able to avoid what may on occasion be

viewed by the public as unwise or unpopular decisions on the part of the Board. I suggest, however, that members of this court should be willing to assume that risk in order to preserve a system that I submit has served the State of Nevada well for over one and a quarter centuries. Paraphrasing a platitudinous metaphor, the wheel, as yet unbroken, is hardly in need of replacement. And who knows, the new product may be inferior to the old.

YOUNG, Justice, with whom ROSE, Justice, agrees, dissenting:

Respectfully, I dissent. I conclude that the Nevada Board of Pardons Commissioners (Board) did not have jurisdiction to rescind the commutation of a sentence. Once the Board issued an order with an effective date, Kelch had a protected liberty interest in release and the Board lost jurisdiction to rescind the commutation.

The majority concedes that Kelch's protected liberty interest vested on the effective date of the order. Once a liberty interest vests, the Board may only rescind the order of release in very limited circumstances.

> [T]he parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?

Morrissey v. Brewer, 408 U.S. 471, 479-80, 92 S.Ct. 2593, 2599-2600, 33 L.Ed.2d 484 (1972). I submit that in this case the Board was divested of jurisdiction to rescind Kelch's commuted sentence where he did not violate the conditions of release. Absent a violation, the Board lacked jurisdiction to recommit Kelch.

The Board may not revoke a release simply because additional information comes to light after the grant of commutation. *Ellard v. Alabama Bd. of Pardons and Paroles*, 824 F.2d 937, 946 (11th Cir.) *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1987). If this were not so, Kelch would conceivably be subject to revocation of his release indefinitely, through no fault of his own.

The majority contends that Kelch's interest was protected by adequate procedural due process. Affording him the opportunity to be heard at a meaningful time and in a meaningful manner did not cure the fact that the Board did not have indefinite jurisdiction absent a violation of release conditions; the wording of the order "effective this date" undermines the rationale of the majority.

The majority cites *McLaughlin v. Bronson*, 537 A.2d 1004 (Conn.1988) as a case similar to Kelch's, wherein the Connecticut Board of pardons revoked the prisoner's commutation after rehearing. However, the Connecticut Supreme Court stated, "[W]e hold that the board may revoke an absolute commutation, prior to actual release of the prisoner, if the factual basis upon which the commutation was granted proves to be erroneous, and the justification for granting the commutation is thereby abrogated." *id.* at 1006. *McLaughlin* can be distinguished

from the case at hand; there is no assertion here that Kelch made misrepresentations to the Board. This is a case of additional information coming to light after the Board commuted his sentence, which is a very different situation.

This case illustrates why Supreme Court Justices should not sit on the Board of Pardons. We grant early release with one hand and snatch it away with the other. A conflict of interest is inherent when this court is asked to review its own decisions while sitting in another capacity.

For these reasons, I conclude that the Board lost jurisdiction to revoke the early release once the order became effective, absent a violation of conditions by the parolee or misrepresentation to the Board. To retain jurisdiction violates the parolee's substantive due process rights. I cannot join the majority in finding that the Board retained the right to revoke release indefinitely upon discovery of additional information.

APPENDIX G

Robert Maxwell KELCH,
Petitioner-Appellant,

v.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, and Ron Angelone,
Respondents-Appellees.

No. 93-15081.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 5, 1993.

Decided Dec. 1, 1993.

Inmate's petition for habeas corpus relief, on ground that Nevada Board of Pardons Commissioners violated due process when it rescinded earlier commutation of sentence, was denied by the United States District Court for the District of Nevada, Lloyd D. George, Chief Judge. Inmate appealed. The Court of Appeals, David R. Thompson, Circuit Judge, held that: (1) Board had jurisdiction to rescind commutation under Nevada law; (2) commutation order created liberty interest in inmate; *and* (3) rescinding commutation did not violate due process where district attorney received inadequate notice of initial hearing.

Affirmed.

Stewart L. Bell, Bell, Davidson & Meyers, Las Vegas, NV, for petitioner-appellant.

William P. Henry, Sr. Deputy General, Las Vegas, NV, for respondents-appellees.

Appeal from the United States District Court for the District of Nevada.

Before: BOOCHEVER, THOMPSON and O'SCANNLAIN, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

This is an appeal from the district court's denial of a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 (1988). We have jurisdiction under 28 U.S.C. § 1291 (1988), and we affirm. We hold that the Nevada Board of Pardons Commissioners ("the Board") did not deny Robert Maxwell Kelch, a Nevada state prisoner, substantive due process under the Fourteenth Amendment when it rescinded its earlier commutation of his sentence.

FACTS

In 1985, Kelch pleaded guilty to second degree murder of his wife. The trial court sentenced him to twenty years in prison, the maximum penalty for this offense under Nevada law. After he had served two years, he applied to the Nevada Board of Pardons Commissioners for a pardon or commutation of his sentence. At the request of Kelch's attorney, a Board member scheduled a hearing for May 12, 1987. Although notice was sent to the district attorney one day after the hearing was scheduled, the chosen date gave the district attorney only twelve days notice of the hearing, instead of the thirty days prescribed by statute. No Board member made an explicit determination that there was "good cause" to reduce the notice period.

At the May 12, 1987 hearing, the Board heard evidence that included Kelch's educational pursuits, assistance to other prisoners, and model behavior during his incarceration. The Nye County District Attorney did not attend the hearing, nor did he respond in any way to the notice he had received twelve days earlier. As a result, the Board heard no evidence against Kelch's requested commutation. After the hearing, the Board issued an order commuting Kelch's sentence from twenty to five years.

Before Kelch's release, the Nye County District Attorney filed a motion for reconsideration. The Board granted the motion and held a second hearing on November 23, 1987. At this hearing the District Attorney appeared and asked the Board to reinstate the original sentence.

At the second hearing, the Board heard dramatically different evidence from that presented at the first hearing. At the first hearing, Kelch told the Board that he accidentally shot his wife when he moved the gun he killed her with from one room to another, and that the gun was five feet from her when it discharged. Kelch's lawyer argued there was no evidence that Kelch had intentionally killed his wife.

In contrast, at the second hearing, the Board learned that the gun was only two feet from Kelch's wife when it discharged, and Kelch had previously told his wife he "was going to shoot her between the eyes one of these days." Kelch killed his wife by a shot in the eye.

The Board also heard evidence at the second hearing that Kelch's wife's daughter, who was present when Kelch shot his wife, stated that Kelch "walked up to [his

wife], pointed a gun to her face, and said, 'Do you want to see something funny?' " That's when the shot that killed her was fired.

At the first hearing, Kelch's attorney represented that Kelch was "not a violent person;" Kelch had not been physically violent with his wife in the past; they had a "loving relationship;" and his wife had not been afraid of him. At the second hearing, the Board heard evidence that Kelch was a violent person with "an explosive temper;" Kelch and his wife argued frequently; the couple had been asked to leave a bar because they created a scene fighting; his wife was contemplating divorce at the time of her murder; Kelch beat his wife; she had expressed fear of him; and three days before the shooting he publicly tried to choke her. The second hearing also revealed that Kelch had a history of substance abuse, his own mother had obtained a restraining order against him, and he had threatened other people with the same caliber weapon his wife was shot with. Based upon the evidence presented at the second hearing, the Board rescinded the commutation of Kelch's sentence by a vote of six to one.

Kelch then filed a petition for a writ of habeas corpus in the United State District Court for the District of Nevada. That court denied the petition because Kelch had not exhausted his state court remedies. Kelch returned to state court. The Supreme Court of Nevada denied his habeas petition. That court held that although he had obtained a liberty interest when the Board commuted his sentence, the Board had provided him with due process in the rescission of that commutation. *Kelch v. Director, Nev. Dept. of Prisons*, 107 Nev. 827, 822 P.2d 1094 (1991)

On May 26, 1992, Kelch filed his second federal habeas petition in the district court. He contended that the Nevada Supreme Court erred by not evaluating the rescission of his commuted sentence under the requirements of substantive due process. The district court denied the petition. It held that Kelch had a liberty interest in the commutation of his sentence, but that the Board had not denied him procedural due process in its rescission, nor had the Board violated his substantive due process rights. This appeal followed.

ANALYSIS

A. The Board's Jurisdiction to Rescind the Commutation

[1] Whether the Nevada Board of Pardons Commissioners had jurisdiction to rescind the commutation of Kelch's sentence is a question of state law, separate from the due process issue.

Article 5, section 14 of the Nevada constitution and section 213.010 of the Nevada Revised Statutes establish the Nevada Board of Pardons Commissioners. The Board has the power to commute sentences "upon such conditions and with such limitations and restrictions as they may think proper." Nev.Const. art. V, § 14. However, neither the Nevada constitution nor Nevada statutory law states whether, or under what circumstances, the Board may revoke a commutation, once granted.

Nor has any Nevada court, including the Nevada Supreme Court that heard Kelch's state habeas petition, directly addressed the issue whether the Nevada Board of

Pardons Commissioners had jurisdiction to rescind its grant of a commutation of a sentence. We must, therefore, predict how the Nevada Supreme Court would rule if it were to address this issue. *S & R Metals, Inc. v. C. Itok & Co.*, 859 F.2d 814, 816 (9th Cir.1988) ("In the absence of . . . express guidance, we must interpret and apply the law as we predict the state's highest court would interpret and apply it.") (citing *Fiorito Bros. v. Fruehauf Corp.*, 747 F.2d 1309, 1314 (9th Cir.1984)).

We predict that if the Nevada Supreme Court were to consider the issue, it would hold that the Board has jurisdiction to rescind its commutation of a sentence, as the Board did in this case. Indeed, the Nevada Supreme Court decided this question by implication when it denied Kelch's state habeas petition. If the Board had lacked jurisdiction to rescind its commutation of Kelch's sentence, the Nevada Supreme Court would have said so. It did not. Moreover, Justice Young in his dissent in *Kelch* confirmed that the majority implicitly held the Board had jurisdiction to rescind the commutation of Kelch's sentence. Justice Young wrote: "Respectfully, I dissent. I conclude that the Nevada Board of Pardons Commissioners (Board) did *not* have jurisdiction to rescind the commutation of a sentence." *Kelch*, 822 P.2d at 1099 (Young, J. Dissenting) (emphasis added).

Our prediction is further buttressed by the fact that under Nevada law the Nevada Board of Pardons Commissioners is an executive board. *State v. District Court*, 85 Nev. 485, 488, 457 P.2d 217, 218 (1969) ("In this state the granting of any relief from punishment after incarceration in the state prison is an executive function authorized by the legislature and performed by the state board

of parole commissioners, or by the state board of pardons commissioners."); *State v. Clark*, 90 Nev. 144, 147, 520 P.2d 1361, 1363 (1974) ("In this State the granting of relief from incarceration is authorized by the legislature and performed by the state board as an executive function.") The Supreme Court of Nevada has held that "administrative agencies have an inherent authority to reconsider their own decision, since the power to decide in the first instance carries with it the power to reconsider." *L & T Corp. v. City of Henderson*, 98 Nev. 501, 504, 654 P.2d 1015, 1017 (1982) (quoting *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir.1980)).

We conclude that, under Nevada state law, the Board of Pardons Commissioners is an executive board and had jurisdiction to rescind its commutation of Kelch's sentence.

B. Substantive Due Process

Although the Nevada Board of Pardons Commissioners had the power to rescind the commutation of Kelch's sentence, we must determine whether its exercise of that power violated Kelch's right to substantive due process.

The district court found no violation of Kelch's right to procedural due process, and Kelch does not contest this. Instead, he argues that at the moment the Board commuted his sentence to five years he obtained a vested, substantive due process right to be released in accordance with that commuted sentence, and regardless of the procedures the Board afforded, that right could not be taken away. *See Wood v. Ostrander*, 879 F.2d 583, 589 (9th Cir.1989) (substantive due process protects individuals

against governmental acts "that are prohibited 'regardless of the fairness of the procedures used to implement them.' ") (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990).

The due process clause of the Fourteenth Amendment provides that no state "shall deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV. In analyzing Kelch's substantive due process argument, we must decide: (1) whether Kelch obtained a liberty interest when the Board commuted his sentence, and (2) if he did, whether the Board's rescission of that commutation violated substantive due process.

[2] In determining whether Kelch obtained a liberty interest, one of the relevant questions is whether he suffered a "sufficiently 'grievous loss' to trigger the protection of due process." *Olin v. Wakinekona*, 461 U.S. 238, 252, 103 S.Ct. 1741, 1749, 75 L.Ed.2d 813 (1983) (citing *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980)). In *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) the Supreme Court held that once a prisoner is granted parole, its termination inflicts a "grievous loss" on the parolee. *Id.* at 482, 92 S.Ct. at 2601.

If termination of parole inflicts a grievous loss, so too does revocation of a commutation of sentence. The Court, however, has " 'reject[ed] . . . the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the . . . protections of the Due Process Clause.' " *Jago v. Van Curen*, 454 U.S. 14, 17, 102 S.Ct. 31, 34, 70 L.Ed.2d 13 (1981) (citing *Meachum v. Fano*, 427 U.S. 215,

224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976)). In determining whether the due process clause affords Kelch the protection he seeks, we must look "to the nature of the interest at stake." *Board of Regents v. Roth,* 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972). The Court has determined that "to obtain a protectible right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' " *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979) (citing *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)).

Here, Kelch had a legitimate expectation of commutation of his sentence – not merely a unilateral hope. The Board created this expectation when it issued its order stating: "It is hereby ordered that effective this date appellant's sentence be commuted from 20 years to five years of imprisonment. . . . "

Jago is not to the contrary. There, the Court held that no liberty interest existed where the parole board notified the prisoner that the board "is . . . ordering a parole release," but the Board subsequently decided to deny parole, and parole was never formally granted. *Jago,* 454 U.S. at 15, 17, 102 S.Ct. at 33, 34. Here, Kelch's sentence was commuted by formal order of the Board.

We reject the appellees' argument that Kelch could not have a legitimate liberty interest in the commutation of his sentence until he was actually released. We agree with the Eleventh Circuit's treatment of this issue in *Ellard v. Alabama Board of Pardons and Paroles,* 824 F.2d 937,

943 (11th Cir.1987), *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988). There, the court held that a prisoner's constitutionally protected liberty interest is parole granted by the Alabama Board of Pardons and Parole was not defeated by his release from confinement in Alabama and transfer to a prison in Georgia to serve out a separate sentence imposed by that state. *Id.* The prisoner in *Ellard* had not been released from the Georgia prison when the Board revoked his parole. Observing that the Board lacked unrestricted authority to revoke probation, the court concluded he had a protected liberty interest in his parole.

We conclude that Kelch obtained a liberty interest when the Board issued the order commuting his sentence. This liberty interest entitled him to substantive due process. Substantive due process requires that government action depriving a person of life, liberty or property have a rational, non-arbitrary connection to a legitimate purpose. *See, e.g., Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976); *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir.1974). "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' " *Youngberg v. Romeo*, 457 U.S. 307, 320, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982), quoting *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting).

Kelch clearly has a strong interest in his release from prison in conformance with the commutation order. The state created this interest when it granted the commutation of sentence, and it should not be overridden lightly.

An individual's liberty encompasses the ability to pursue interests of choice, to move from place to place unhindered by the government, and to choose freely any lawful way of living. "[A liberty interest] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Planned Parenthood v. Casey*, ___ U.S. ___, ___, 112 S.Ct. 2791, 2805, 120 L.Ed.2d 674 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting)). Deprivation of liberty, next to deprivation of life, is the greatest punishment a state can impose upon an individual, and the importance of regaining one's liberty should not be undervalued.

[3, 4] The state's countervailing interest is also strong. A state has a fundamental interest in appropriately punishing those who violate its criminal laws. *Bearden v. Georgia*, 461 U.S. 660, 669, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983), and in separating convicted individuals from the public for the protection of the general population. *See, e.g., Pell v. Procunier*, 417 U.S. 817, 822-23, 94 S.Ct. 2800, 2804-05, 41 L.Ed.2d 495 (1974) (state has legitimate interest in confining prisoners to deter crime and to protect society by quarantining criminal offenders until rehabilitative process can work); *Hickey v. Morris*, 722 F.2d 543, 548 (9th Cir.1983)(state has an interest in avoiding premature release of insanity acquittees who have committed felonies and have been declared dangerous to society). The state also has an interest in insuring that it has a fair opportunity to present the case against prisoners petitioning for early release, and in protecting against the premature release of dangerous criminals.

[5] In this case, the district attorney's stated basis for reopening Kelch's case was Kelch's and the Board's failure to afford him the statutorily required thirty-day notice of the hearing. *See* Nev.Rev.Stat. § 213.020.[1] The district attorney argues this lack of notice prevented him from preparing any response to the application. This argument has merit.

The state of Nevada protects its interest in avoiding the premature release of prisoners by establishing procedures that ensure fully informed commutation proceedings. The notice requirements are clearly designed to

---

[1] Section 213.020 states as follows:

1. Any person intending to apply to have . . . a punishment commuted, or a pardon granted . . . shall make out a notice and four copies in writing of the application, specifying therein:

(a) The court in which the judgment was rendered;

(b) The amount of the fine or forfeiture, or kind or character of punishment;

(c) The name of the person in whose favor the application is to be made;

(d) The particular grounds upon which the application will be based; and

(e) The time when it will be presented.

2. Two of the copies must be served upon the district attorney and one upon the district judge of the county wherein the conviction was had. The fourth copy must be served upon the director of the department of prisons and the original must be filed with the clerk of the board. . . .

3. The notice must be served, as provided in this section, at least 30 days before the presentation of the application, unless a member of the board, for good cause, prescribes a shorter time.

allow the district attorney sufficient time to marshal evidence and prepare arguments opposing an application for commutation.

Here, Kelch did not follow Nevada procedures for giving notice of his application for commutation.[2] The district attorney received no notice from Kelch of the hearing, and received his only notice from the Board, just twelve days before the hearing. The notice given was less than half the required thirty days, and the district attorney averred he had an inadequate opportunity to prepare for the hearing or even to respond to the application for commutation. As a result, the Board at the first hearing had before it a woefully incomplete picture of Kelch's case.

Because the Board makes its commutation decisions based on the evidence presented at the commutation hearing, it is critical that it have a full and accurate view of he case before deciding whether to commute a sentence. This was clearly what the Nevada legislature intended when it required applicants to give the district

---

[2] Section 213.020(3) of the Nevada Revised Statutes requires that notice of a petition for commutation must be served on the district attorney at least thirty days before the hearing, "unless a member of the board, for good cause, prescribes a shorter time." Kelch does not dispute that the notice to the district attorney fell short of the thirty-day requirement. He claims, however, that when a board member scheduled the hearing only twelve days before the meeting, he must implicitly have found "good cause" to shorten the notice period. [Opposition to Motion for Reconsideration 1-2] We disagree. The ministerial act of scheduling a hearing does not amount to an order shortening time for good cause as required by the statute.

attorney notice and then required the district attorney, upon receiving the required notice, to furnish the Board with a statement containing information relevant to the hearing. *See* Nev.Rev.Stat. § 213.040(1).

The Board's decision making process was impaired here by the district attorney's absence, caused by the failure to furnish the required notice. This failure resulted in an initial hearing which gave insufficient attention to the state's interest. In this circumstance, the Board's subsequent action in rescinding Kelch's commutation of his sentence was a rational, non-arbitrary means of effectuating the state's legitimate interests in informed and properly conducted commutation proceedings and in protecting the general population from dangerous criminals. The balance of the competing interests between Kelch and the state tips in favor of the state. *See Mills v. Rogers*, 457 U.S. 291, 299, 102 S.Ct. 2442, 2448, 73 L.Ed.2d 16 (1982). Accordingly, we hold that there was no substantive due process violation.

CONCLUSION

Under Nevada law, the Nevada Board of Pardons Commissioners had jurisdiction to rescind the commutation of Kelch's sentence. Although Kelch obtained a liberty interest when the Board commuted his sentence, the Board's rescission of the commutation of his sentence did not violate Kelch's right to substantive due process. The district court did not err in denying his habeas petition.

AFFIRMED.

APPENDIX H

233B.020 Legislative intent.

1. By this chapter, the legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the executive department of the state government and for judicial review of both functions, except those agencies expressly exempted pursuant to the provisions of this chapter. This chapter confers no additional regulation-making authority upon any agency except to the extent provided in subsection 1 of NRS 233B.050.

2. The provisions of this chapter are intended to supplement statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.

(Added to NRS by 1965, 962; A 1973, 472; 1977, 1384)

APPENDIX I

233B.039 Applicability.

1. The following agencies are entirely exempted from the requirements of this chapter:

(a) The governor.

(b) The department of prisons.

(c) The University and Community College System of Nevada.

(d) The office of the military.

(e) The state gaming control board.

(f) The Nevada gaming commission.

(g) The state board of parole commissioners.

(h) The welfare division of the department of human resources.

(i) The state board of examiners acting pursuant to chapter 217 of NRS.

(j) Except as otherwise provided in NRS 533.365, the office of the state engineer.

2. Except as otherwise provided in NRS 391.323, the department of education, the committee on benefits and the commission on professional standards in education are subject to the provisions of this chapter for the purpose of adopting regulations but not with respect to any contested case.

3. The Nevada state board of accountancy is not subject to the provisions of this chapter for the purpose of adopting rules of professional conduct for accountants and auditors.

4. The special provisions of:

(a) Chapter 612 of NRS for the distribution of regulations by and the judicial review of decisions of the employment security division of the department of employment, training and rehabilitation;

(b) Chapters 616 and 617 of NRS for the determination of contested claims;

(c) Chapter 703 of NRS for the judicial review of decisions of the public service commission of Nevada;

(d) Chapter 91 of NRS for the judicial review of decisions of the administrator of the securities division of the office of the secretary of state; and

(e) NRS 90.800 for the use of summary orders in contested cases, prevail over the general provisions of this chapter.

5. The provisions of NRS 233B.122, 233B.124, 233B.125 and 233B.126 do not apply to the department of human resources in the adjudication of contested cases involving the issuance of letters of approval for health facilities and agencies.

6. The provisions of this chapter do not apply to:

(a) Any order for immediate action, including but not limited to quarantine and the treatment or cleansing of infected or infested animals, objects or premises, made under the authority of the state board of agriculture, the state board of health, the state board of sheep commissioners or any other agency of this state in the discharge of a responsibility for the preservation of human or animal health or for insect or pest control; or

(b) An extraordinary regulation of the state board of pharmacy adopted pursuant to NRS 453.2184.

(Added to NRS by 1977, 1383; A 1979, 492, 1639; 1981, 1398, 2045, 2046; 1983, 183, 970, 1528; 1985, 1366; 1987, 327, 1014, 1294, 2191; 1989, 160, 1650; 1991, 663, 1665; 1993, 367, 859, 1493, 2084, 2085)